

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAR 11 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2009-0304-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
DANIEL OQUITA GUTIERREZ,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20054047

Honorable Stephen C. Villarreal, Judge

REVIEW GRANTED; RELIEF DENIED

Robert J. Hirsh, Pima County Public Defender
By Michael J. Miller

Tucson
Attorneys for Petitioner

K E L L Y, Judge.

¶1 In this petition for review, Daniel Gutierrez challenges the trial court's denial, after an evidentiary hearing, of his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb the trial court's ruling unless it

has clearly abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2006).

¶2 Gutierrez was indicted for nine felonies arising from an incident in which two men and a pregnant woman were shot and seriously injured during an altercation at a party in December 2004. A jury found Gutierrez guilty of one count of manslaughter, three counts of aggravated assault with a deadly weapon, two counts of aggravated assault causing serious physical injury, and one count of aggravated assault causing temporary but substantial disfigurement. The trial court sentenced him to prison for a total of sixty-six years, and this court affirmed his convictions and sentences on appeal. *State v. Gutierrez*, No. 2 CA-CR 2006-0366 (memorandum decision filed Mar. 17, 2008).

¶3 Gutierrez then filed a petition for post-conviction relief, alleging he had received ineffective assistance from both his trial and appellate counsel. He contended trial counsel had not been sufficiently attentive; had failed to adequately investigate the possibility that a person or persons other than Gutierrez had shot the victims; had failed to interview Jose Baldenegro or call him as a witness; had failed to challenge the evidence that Gutierrez's DNA¹ had been found on the handle of a gun used in the shootings; had failed to investigate Gutierrez's wife's claim that she recognized the jury foreman as a former supervisor at a telemarketing firm where she had worked for approximately a month; and had failed to file a motion for new trial. Appellate counsel, Gutierrez asserted, had ineffectively challenged the identification evidence presented at

¹Deoxyribonucleic acid.

trial by failing to emphasize the discrepancies among the various witnesses' descriptions of the shooter. And, as a further ground for relief, Gutierrez claimed his sentences were excessive.

¶4 Finding the petition stated one colorable claim of ineffective assistance by trial counsel, the trial court held an evidentiary hearing on Gutierrez's contention that counsel had been ineffective in "fail[ing] to investigate other possible shooting suspects." It then denied relief in a minute entry entered on June 26, 2009, which it later supplemented with an "amendment" the following month.² This petition for review followed.

¶5 On review, Gutierrez has abandoned a number of the specific assertions of ineffectiveness he urged below. He challenges the trial court's determination that counsel's decision not to call Jose Baldenegro as a witness had been a tactical one—based on the facts that Baldenegro's testimony would not exculpate Gutierrez and that Baldenegro's friendship with the victims meant there was some risk in calling him—and therefore did not support a claim of ineffective assistance. Second, Gutierrez contends the court should have held an evidentiary hearing on his claim that counsel had failed to fully investigate the possibility that the jury foreman's failure to acknowledge knowing or recognizing Gutierrez's wife meant he had been a biased juror. And, finally, Gutierrez again argues that his sentences are excessive.

²In the second minute entry, the court discussed and rejected Gutierrez's claim that trial counsel had been ineffective in failing to investigate whether the jury foreman may have been biased because he had been a supervisor at a telemarketing firm where Gutierrez's wife had reportedly worked for about a month.

¶6 With respect to both of the ineffective assistance claims on which he now seeks review, Gutierrez’s petition for review adds little of substance to the petition for post-conviction relief he filed below. We find no abuse of the trial court’s discretion in concluding, after an evidentiary hearing on the issue, that counsel’s strategic decision not to call Jose Baldenegro as a witness did not constitute ineffectiveness. Nor can we say the court abused its discretion in finding Gutierrez had not stated a sufficiently colorable claim to warrant an evidentiary hearing on his contention that trial counsel should have investigated whether the jury foreman knew Gutierrez’s wife and was biased as a result. As the court rightly observed, given the lack of any affirmative response from the foreman indicating he had recognized Gutierrez’s wife as someone he knew, it was incumbent on Gutierrez to come forward with some evidence to support his assertion “that [the foreman had] recognized [Gutierrez’s wife]” and was “bias[ed] against her or [Gutierrez].” He produced nothing beyond speculation, and the court thus did not abuse its discretion in finding the claim did not merit an evidentiary hearing. *See* Ariz. R. Crim. P. 32.6 (summary disposition warranted in absence of “material issue of fact or law [that] would entitle the defendant to relief” under Rule 32).

¶7 In its two detailed minute entries, the trial court clearly articulated, properly analyzed, and correctly resolved these claims, and we need add nothing further to its analysis. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993) (when trial court has correctly identified and ruled on issues raised “in a fashion that will allow any court in the future to understand the resolution[, n]o useful purpose would be served by this court[’s] rehashing the trial court’s correct ruling in a written decision”).

¶8 Finally, Gutierrez’s claim that his sentences are excessive was an issue he could have raised on appeal. It is therefore precluded in this collateral proceeding. Ariz. R. Crim. P. 32.2(a)(3). Although the trial court addressed the precluded issue on its merits, we decline to do so.

¶9 We grant the petition for review but deny relief.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge